



Jason D. Oxman
Assistant General Counsel

25 October 2002

David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WCB Docket No. 02-314

Dear Mr. Solomon:

On October 15, 2002, AT&T submitted a sworn affidavit and supporting documentation that, *in toto*, allege a deliberate scheme by Qwest Communications to conceal evidence of material noncompliance with the competitive checklist of section 271 of the 1996 Act. Specifically, AT&T alleges that, on a tour for FCC staff of Qwest facilities in Nebraska in support of its long distance applications, Qwest deliberately concealed evidence that would have demonstrated that it was providing operations support system (OSS) capabilities to itself but not requesting carriers, an issue that Covad had raised on the record before the FCC. Covad is particularly troubled by these allegations, because they suggest that Qwest misrepresented its compliance with DSL-related unbundling obligations pursuant to section 251(c)(3) of the Act and the Commission's implementing rules.¹ In brief, Covad and other carriers have alleged, on the record before the Commission, that Qwest does not comply with checklist items 2 and 4², which relate to Qwest's obligation to provide nondiscriminatory access to operations support systems (OSS).³ More specifically, Covad has argued that Qwest makes available to its own retail DSL arm the capability to conduct pre-order metallic loop testing (MLT), while refusing to provide the same capability to Covad. In its most recent submission in opposition to Qwest's pending long distance applications, Covad again argued to the Commission that "Qwest's failure to provide pre-order access to MLT testing for UNE loops" had significant business impact and violated the checklist.⁴

¹ 47 U.S.C. § 251(c)(3); 47 C.F.R. §§ 51.319 *et seq.*

² 47 U.S.C. §§ (c)(2)(B)(ii) and (iv).

³ See Covad Comments in WC Docket No. 02-148; Covad Reply Comments in WC Docket No. 02-148; Covad Comments in WC Docket No. 02-189; and Covad Reply Comments in WC Docket No. 02-189.

⁴ Covad Comments, WCB Docket No. 02-314, at 2 (filed Oct. 15, 2002). MLT testing allows Qwest to conduct a test of a particular loop to determine its technical parameters and suitability to support DSL

Covad strongly believes that AT&T's allegations, if true, demonstrate a deliberate attempt by Qwest to mislead the Commission by concealing evidence of Qwest's noncompliance with the competitive checklist. In addition to rejecting Qwest's pending long distance applications based on the substantive failure of Qwest to prove checklist compliance, the Commission should open its own investigation into these allegations of deliberate misrepresentation. Section 1.17 of the Commission's Rules states that no applicant shall make any misrepresentation or willful material omission in any application submitted to the Commission.⁵ Section 1.65 of the Commission's Rules requires applicants to furnish "additional or corrected information" whenever information furnished in a pending application is no longer substantially accurate and complete in all significant respects, or when there has been a substantial change as to any other matter that may be of decisional significance in a Commission proceeding involving that application.⁶ Applicants that violate these rules are subject to the Commission's enforcement authority.⁷

As noted by the Department of Justice in its evaluation of Qwest's pending application, Qwest "admits that references to MLTs were removed from chart-boards in advance of visits by regulators to the QCCC."⁸ In other words, Qwest acknowledges that it deliberately manipulated materials in its ordering center, knowing that FCC staff would otherwise view the materials, which had the effect of concealing references to MLT from Commission staff. At the same time, Qwest has not modified its pending long distance applications, nor its previously withdrawn applications, to correct or otherwise modify any representations made to the Commission, either in writing or

services. By refusing to provide such capability on pre-order basis to Covad, Qwest denies Covad the same capabilities that Qwest retail personnel possess.

⁵ In relevant part, section 1.17, 47 C.F.R. § 1.17, states: ". . . No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission."

⁶ In relevant part, section 1.65, 47 C.F.R. § 1.65, states: Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. . . For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

⁷ See, e.g., 47 U.S.C. § 503(b).

⁸ DOJ Evaluation at 5, citing Qwest Response to MLT Allegations *Ex Parte* at 1-5.

in the context of a site visit. The Commission has previously shown no tolerance for misrepresentations made in the context of long distance proceedings.⁹ This case suggests facts that, if proven true, would represent a violation of the Commission's rules, and the Commission must continue to take action to deter future misrepresentations by long distance applicants. State regulators, even those outside of Qwest's territory, are taking concrete steps to ensure that Qwest is sufficiently punished for violating the law.¹⁰

In addition to requesting that the Commission investigate these matters on its own motion, Covad is also strongly considering pursuit of additional remedies for damage suffered as a result of Qwest's ongoing refusal to provide Covad with OSS capabilities in compliance with its legal obligations. In the interim, as the Commission proceeds with its own investigation, Covad stands prepared to assist in whatever way it can, including the provision of information regarding the competitive impact of Qwest's actions. Please do not hesitate to contact me if I can provide any further information.

Respectfully submitted,

/s/ Jason Oxman

Jason D. Oxman

cc:

Anne L. Weismann, Deputy Bureau Chief, EB
Charles Kelley, EB
Maureen Del Duca, EB
William Maher, Chief, WCB
WCB Staff

⁹ See, e.g. "FCC, SBC COMMUNICATIONS, INC. AGREE TO CONSENT DECREE - SBC TO MAKE \$3.6 MILLION PAYMENT TO UNITED STATES TREASURY," Press Release, available at http://www.fcc.gov/eb/News_Releases/DOC-222865A1.html (consent decree and \$3.6 million payment to end investigations into misrepresentations in the SBC Missouri, Oklahoma, and Kansas long distance applications).

¹⁰ See, e.g., "California Fines Qwest \$20.3 Million for Slamming," Reuters, Oct. 24, 2002 (quoting California PUC statement that "[t]he fine, refunds and corrective actions are designed to provide Qwest with the clear message that slamming and cramming are not acceptable in California, and that Qwest must make substantial changes to its marketing policies and practices related to long-distance sales.").